NO. 82-1295

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

ESCAMBIA COUNTY, FLORIDA, ET AL.,
Appellants,

v.

HENRY T. MCMILLAN, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF APPELLEES

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SUMMARY OF INTERVENING EVENTS

Since the Brief of Appellees was filed, the following events affecting this case have occurred:

1. In primary and general elections conducted in September and November 1983 a new Escambia County Commission was elected from single-member districts. Four of the five incumbent commissioners who had voted to prosecute this appeal were defeated; only Kenneth Kelson was reelected. The issue of whether this appeal should be maintained or dismissed was prominently featured in the campaigns of the defeated incumbents.[1] Their claims about the importance of continuing this appeal did not result in their reelection.

[1]For example, ex-Commissioner Woolard ran a television advertisement showing him standing in front of the federal courthouse and proclaiming

2. The new county commissioners took office on November 15, 1983, and on December 1 they voted 3 to 2 to dismiss this appeal. Accordingly, a motion to dismiss this appeal was filed on or about December 5, 1983, on behalf of Escambia County and its Board of County Commissioners. The motion to dismiss and the accompanying motion to substitute new county commissioners as appellants were signed by Thomas R. Santurri, Escambia County Attorney.

3. By letter dated December 6, 1983, Charles S. Rhyne, the Washington attorney who has represented Escambia County and its Board of County Commissioners throughout the trial and appeals of this case, informed this Court that he would appear at the oral argument of this action in behalf of four former commissioners, John E. Frenkel, Billy Tennant, Gerald Woolard and Marvin Beck, and the two present commissioners who voted against dismissing this appeal, Kenneth Kelson and Max Dickson. By letter dated December 13, 1983, Mr. Rhyne further notified this Court that his name was incorrectly and "unintentionally" listed on the motion to dismiss the appeal that had been filed by Escambia County. In this state of affairs, it is unclear to Appellees what lawyers will appear for Escambia County. Mr. Rhyne has filed a Reply Brief for the individuals mentioned above.[2]

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his determination to continue the appeal of the District Court's orders. See the news article reproduced from the September 14, 1983, edition of the *Pensacola Journal*, which is reproduced as Appendix A to the supplemental brief. Woolard was defeated.

[2]Charles Rhyne has been co-counsel with the Escambia County Attorney since the beginning of this litigation. To the best of our knowledge, all of his fees have been paid from the public treasury of Escambia County. Appellees understand Mr. Rhyne has associated as his local counsel Ms. Paula Drummond, who formerly was a staff attorney for Escambia County, Florida.

4. On January 5, 1984, the Escambia County Commission formally adopted an election plan which in relevant respects is identical to the court-ordered plan that the Court has been asked to review in this appeal. This action effectively moots the remedy issue.

ARGUMENT

I. The Adoption by the Escambia County Commission of the Election Plan Approved By the District Court Renders Moot the Remedy Issues in This Case.

The Brief of Appellees, pp. 37-43, takes issue with the contention in the Brief of Appellants, pp. 42-49, that either the Florida Constitution or previous decisions of this Court empower the noncharter Escambia County Commission to enact a legislative remedial election plan in response to the District Court's judgment striking down the at-large election system. However, even if the theory of the original Appellants were correct, according to that theory the action taken by the Escambia County Commission on January 5, 1984, adopting a 5-0 single-member district election plan would supersede the 5-2 plan adopted by the Commission in 1983. Accordingly, no

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Canon Five of the American Bar Association Code of Professional Responsibility provides that "a lawyer should exercise independent professional judgment on behalf of the client." Ethical Consideration 5-18 provides:

> A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization.

Canon Four of the American Bar Association Code of Professional Responsibility provides that "a lawyer should preserve the confidences and secrets of a client". ABA Formal Opinion No. 165 (Aug. 23, 1936) provides that "an attorney must not accept professional employment against a client or former client which will, or even *may* require him to use confidential information obtained by the attorney in the course of his professional relations with such client regarding a subject matter of the employment . . . ." *See also* Ethical Consideration 4-5.

matter which view of the law is correct, the remedy issue presented in this appeal is moot. The original Appellants contended that federal courts must defer to the desires of the county commission regarding the form of the election plan. Now the Escambia County Commission's plan is the same as the District Court's plan. The only election plan that can claim legitimacy is the one by which elections were held in 1983.

II. Neither the Former Commissioners Nor the Two Present Commissioners Who Voted Against Dismissal Are Parties Who May Maintain this Appeal.

None of the six persons named in Charles Rhyne's letter of December 6, 1983, as those he represents is a party in either his official or individual capacity, who may maintain this appeal and thwart the will of the people of Escambia County who, through their recently elected County Commission, have sought to have the appeal dismissed.

A. *The Four Former Commissioners Are Not Appellants.*

Frenkel, Tenant, Woolard and Beck are no longer in office. Under the District Court's standing pretrial order, they are no longer parties to this action in either their official or individual capacities.

The Complaint listed as defendants Escambia County Florida, Charles Dease, Kenneth Kelson, Zearl Lancaster, Jack Kenney, Marvin Beck, individually and in their official capacities as members of the Board of County Commissioners of Escambia County. J.A. 45. The defendants' answer sought dismissal of the individual defendants:

> The Complaint fails to state a cause of action against said Defendants in their respective individual capacities because of its failure to allege any acts by said Defendants in their individual capacities and because of its failure to pray for any relief from said Defendants in their individual capacities as opposed to any relief from said Defendants in their respective representative capacities.

J.A. 55.

The district judge in his order of May 18, 1977, directed the parties to submit memoranda concerning "[w]hether these actions should proceed against the members of the County Commission . . . in their individual capacities." J.A. 59. The Defendants' memorandum filed May 27, 1977, Docket No. 46, argued that (1) the Complaint did not contain any allegations against the Defendants in their individual capacities, (2) complete relief could be granted by injunction against the Defendants in their official capacities, and (3) the individual Defendants had "no responsibilities for the acts complained of by the plaintiffs and are incapable of granting relief to plaintiffs under mandatory injunctions." The district judge informed counsel by letter of August 4, 1977:

> Insofar as the action's proceeding against the individual defendants in their individual capacities, relief sought, if granted, must, of course, be given against them in their representative capacities. Nonetheless, because of possible problems of enforcement which would run against them personally if such were to be required, it seems to me it may be that they should be retained in their individual capacities.
>
> In any event, I do not see how much harm can be done by retaining them in their individual capacities, and I have no motion before me on which I can take action.

J.A. 62. The issue was raised again at the pretrial conference, and the pretrial order of May 12, 1978, provides as follows:

> 9. At pre-trial conference the question of dismissal of the parties defendant in their individual capacities was presented to the court on motion. It was made clear at the pre-trial conference that plaintiffs do not seek under the complaint filed in this case and will not seek any judgment for attorney's fees or court costs against these parties in their individual capacities and the court agrees that in the pleadings presented to the court there would be no basis for any such relief against them individually.
>
> The court does conclude that they should be left in for purposes of injunctive relief and for purposes of enforcement of any injunctive decree entered, if such is entered. For that reason such motion is denied.

> 10. Prior to trial, in the light of possible changes in defendants before the court in the representative capacities the parties will jointly agree on what changes have been made and under the rules come before this court and substitute those who now should be here in such representative capacities.
>
> Inasmuch as these defendants are left in individually the substitution will take out of this case both individually and in their representative capacity those who are no longer in office and will substitute those now in office in their place individually and in such representative capacity.

J.A. 78-79.

Three of the original Defendant Commissioners left office during the litigation and were replaced by gubernatorial appointments. The Defendants themselves filed motions to have Frenkel substituted as a party defendant "in his official capacity" for Kenney on December 5, 1978; to substitute Woolard for Dease as a party defendant "in his official capacity" on November 29, 1979; and to substitute Tennant for Lancaster as a defendant on or about December 29, 1982. By the time the decision was made to appeal to this Court, only two of the five commissioners had ever been elected, and all five commissioners, whether elected or appointed, had served beyond their terms of office.

The notice of appeal to this Court was filed on behalf of "Escambia County, Florida, [and] the members of the Board of County Commissioners." J.S. 120a.

It is clear from the state of the pleadings that Frenkel, Tennant, Woolard and Beck appealed to this Court as "members of the Board of County Commissioners." They are no longer in office as members of the Board of County Commissioners. Under the outstanding pretrial order, when they left office they were automatically dismissed in both their official and individual capacities when notice of substitution for them was filed in this Court. Under no circumstances can they still be considered as appellants before this Court.

B. *The Two Present Commissioners Who Dissented From the Decision to Dismiss May Not By Themselves Maintain This Appeal.*

The two present dissenting commissioners, Kelson and Dickson, do not have sufficient individual status in the case to maintain an appeal in their individual capacities. The District Court's pretrial order leaves them in the action as individuals only for the purpose of insuring enforcement of its decrees; they are not subject to any claims for damages or other relief against them individually, such as attorneys' fees or court costs. J.A. 78-79. Since there can be no enforcement problem as long as the majority of the members of the Escambia County Commission comply with the outstanding court orders, there is not any individual status that would support an appeal by Kelson and Dickson.

Under Florida law, individual members of commissions or boards may not prosecute actions or appeals, either in their individual or official capacities.

The Supreme Court of Florida has held that duties or responsibilities that are carried out in the name of "the Board of County Commissioners" or "the County Commissioners" are properly carried out by a majority of the county commissioners acting at a lawful meeting. *Scott v. State*, 143 So. 249 (Fla. 1932); *accord*, Fla. Atty. Gen. Op., Sept. 8, 1947, No. 047-287, and June 17, 1975, No. 075-178. Individual members of the Board of County Commissioners have no power to act with binding effect on the county government. *See Kirkland v. State*, 86 Fla. 64, 97 So. 502 (1923).

With respect to the maintenance of litigation, the Florida Legislature has provided:

> The legislative and governing body of a county shall have the power to . . . [p]rovide for the prosecution and defense of legal causes in behalf of the county or state and retain counsel and set their compensation. . . .

Fla. Laws § 125.01 (1) (b).

In *Department of Education v. Lewis*, 416 So.2d 455 (Fla. 1982), the State Commissioner of Education, a trustee of a community college, and the State Department of Education sued the comptroller and secretary of state, alleging the unconstitutionality of a provision in an appropriations bill which denied funds to any educational institution which in any way supports "sexual relations between persons not married to each other." The Florida Supreme Court held that all three plaintiffs lacked standing in their official capacities to challenge the appropriation act. 416 So.2d at 458. The court noted that only the comptroller, and in some cases, the Florida Attorney General could initiate litigation to challenge the constitutionality of legislation. 416 So.2d at 459. Similarly strict standing rules were applied in *Williams v. Howard*, 329 So.2d 277 (Fla. 1976), wherein two members of the Florida Parole and Probation Commission challenged legislation which transferred the powers and duties of that Commission to another agency. The court held that two Commission members "in their capacity as a minority of the Parole and Probation Commission lacked standing to maintain a suit." 329 So.2d at 279.

The lack of authority for a county commissioner to sue in behalf of the county corresponds to a statute regulating suits against counties. *Alianell v. Fossey*, 114 So.2d 372 (Fla. 3rd DCA 1959), held that Chapter 125.15 of the Florida Laws prohibits a suit against commissioners in their individual capacities. There does not appear to be any statute or court precedent in Florida giving a commissioner who is in the dissenting minority standing to continue litigation as an individual or as an official.

Similar results have been reached in other states. In *Elterich v. Arndt*, 27 P.2d 1102 (Wash. 1933), five taxpayers sued the county, the members of the county commission and others, and obtained an injunction against all of the commissioners, restraining them from "letting any contract for the construction of any bridge." 27 P.2d at 1102. One member of the Commission (Arndt) appealed as a member of the Commission and as an individual, "feeling himself aggrieved." *Id.* The appeal

was dismissed, because as an individual the appellant did not have a substantial interest in the subject matter of the litigation nor was he aggrieved or prejudiced by the restraining order. "Appeals are not allowed for the purpose of settling abstract questions, however interesting or important to the public generally, but only to correct errors injuriously affecting the appellant." *Id.* Furthermore, the court held that Arndt, as a member of the Board of County Commissioners, could not maintain the appeal. "The appeal, not having been taken or authorized by the Board in its official capacity, but by only one member thereof, is a nullity." 27 P.2d at 1103. *See* also *Terrill v. City of Tacoma,* 80 P.2d 858, 859 (Wash. 1938); *State ex rel. Simeon v. Superior Court for King Co.,* 145 P.2d 1017, 1019 (Wash. 1944).

A similar ruling was made in *State ex rel. Erb v. Sweaas,* 107 N.W. 404 (Minn. 1906). A mandamus action was brought against the county government and each of the commissioners. After an adverse judgment, two of the commissioners attempted to appeal. The appeal was dismissed.

> The action was commenced against the Board of County Commissioners in their corporate or official capacity, and, though the individual members were named as respondents, all steps in reference to the proceeding, either in defending it or appealing from a judgment therein, could be taken only by the official action of the Board. If the action involved the rights of the individual members, the position of the appellants would be tenable; but as it does not, but only the Board as an official body, the attempted appeal by two members on behalf of their associates was wholly ineffectual.

107 N.W. at 405. *See also Huber v. Hennepin County Welfare Board,* 83 N.W.2d 511, 515 (Minn. 1957); *Hart v. Bye,* 86 N.W.2d 635, 638 (N.D. 1957); *Ray v. Trapp,* 609 S.W.2d 508, 510 (Tenn. 1980); *In re Appointment of Special State's Attorneys, Rudman v. Grabavoy,* 356 N.E.2d 195 (Ill. App. 1976); *Buchele v. Woods,* 528 S.W.2d 95 (Tex. Civ. App. 1975).

Under federal precedent, as well, Commissioners Kelson and Dickson may not continue to prosecute this appeal as individ-

uals. In *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969), the District of Columbia School Board voted not to appeal a school desegregation order, but an appeal was filed by Smuck, a member of the Board of Education. The Court of Appeals ruled that he could not maintain the appeal.

> While he was in that capacity a named defendant, the Board of Education was undeniably the principal figure and could have been sued alone as a collective entity. Appellant Smuck had a fair opportunity to participate in its defense, and in the decision not to appeal. Having done so he has no separate interest as an individual in the litigation. The order directs the Board to take certain actions. But since its decisions are made by a vote as a collective whole, there is no apparent way in which Smuck as an individual could violate the decree and thereby become subject to enforcement proceedings.

408 F.2d at 178.

CONCLUSION

Recent events provide reasons in addition to those set out in the Brief of Appellees why this appeal should be dismissed. The remedy issue is moot, and there are no appellants with standing to maintain this appeal.

Respectfully submitted,

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APPENDIX

Coast

The Pensacola Journal
Wednesday, September 14, 1983

Death Notices, 4C
Classified, 4-8C

C

First election since 1978

Voters decide time for change

By CRAIG PITTMAN
Journal Staff Writer

They've all been in office a lot longer than anyone expected.

But three of the five incumbents in Tuesday's race for the Escambia County Commission are out of a job now, and the fourth is in jeopardy.

Commissioners Marvin Beck, Gerald Woolard and Billy Tennant went down to defeat Tuesday in the Democratic primary.

Commissioner John Frenkel Jr., who came in second in the District 4 race, is in a runoff with a political newcomer and may even find himself bumped out of that race by challenger Muriel Wagner, depending on the results of today's absentee vote count.

Only District 2 Commissioner Kenneth Kelson won re-election to his post in Tuesday's primary, the first time Escambia voters had a chance to pull a lever in a commission race since 1978.

And that may have been the problem, say the incumbents.

The five men in office have battled a voting rights case through the federal court system all the way to the top, the U.S. Supreme Court. They have spent thousands of dollars to do so, contending all the while they are only continuing the fight because they are sworn to defend the state Constitution.

But in the meantime, elections that should have been held in 1980 and 1982 were put off. Two commissioners who resigned were replaced by men appointed by the governor, not elected by the voters, and the terms of all five have run out.

The expense and the delay have probably turned many voters against the incumbents.

What the five have been fighting is the district system of elections, an abstract concept that the voters may not have understood completely until they went to vote Tuesday.

In previous elections, the state Constitution said that every voter in Escambia County got to vote on all five commissioners. But because of the voting rights case, the voters now can only pick one commissioner, and that one only from the candidates running in their district.

"This issue the incumbents have been trying to push — 'I want to vote for everybody' — is more important than anyone has realized," Frenkel said Tuesday night

See INCUMBENTS, Page 4C

Incumbents

Frenkel said he got complaint after complaint from Frenkel-backers who wanted to vote for him but couldn't because they didn't live in District 4.

Commission Chairman Gerald Woolard, who was in Orlando Tuesday for the State Association of County Commissioners' meeting, agreed with Frenkel on the importance of the voting issue in the campaign.

"I think all along I've felt some dissatisfaction (among the voters)" Woolard said. "A lot of it is tied up to the lack of elections."

During the campaign, Woolard made a strong television commercial that showed him standing on the steps of the federal courthouse and proclaiming his determination to defend the people of Escambia County from the dictatorial decisions of a single federal judge.

Apparently that did not impress enough of the voters. The former Navy officer spent more money than any of the other nine candidates in the District 1 race, but placed third in the field.

The voters in District 5 were even less impressed with their incumbent, Marvin Beck, and his defense of the commission's continued appeals. He placed fifth in a field of six candidates.

Beck said it is tough to run a campaign "when you're trying to defend the constitution when peole don't understand it."

Beck, a former basketball coach and teacher, added that he does not envy the man who takes his place in representing far-flung, largely rural District 5.

One incumbent, Commissioner Billy Tennant, lost to Kelson in the District 2 race.

Tennant had been in District 3, but court-ordered redistricting tossed him into the race with Kelson.

Tennant, like Woolard, was appointed to the commissioner's post and thus was facing the voters for the first time. And he was up against a fellow incumbent who ran unopposed in the 1978 elections. Tennant outspent Kelson, but failed to outpoll him. He said he has no idea what happened.

Kelson has been the maverick among the incumbents, however. He often wound up on the losing end of 4-1 votes, earning him the nicknames of "Dr. No" and "the Abominable No-man." In a way, he was an incumbent who was not one of the incumbents.

On the other hand, two of the men who helped unseat the three commissioners are about as close to being incumbents as you can get without actually holding the title, county Supervisor of Elections Joe Oldmixon said Tuesday.

Oldmixon pointed to former county Sheriff Bill Davis, who was the frontrunner in the District 1 race, and former Commissioner Grady Albritton, the frontrunner in the District 5 race.

"Bill Davis is like an incumbent because he has run so many times," Oldmixon said. "And Grady Albritton is the same way."

However, both those men must beat political newcomers in the Oct. 4 runoff election to become part of the new incumbents.